87-1949

Supreme Court, U.S.
FILED
APR 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1987

NATHAN VACANTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICK L. HOFFMAN
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ATTORNEY of PETITIONER
24 N. 2ND STREET
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(509) 575-8961

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Petitioners's First and Fourth amendment rights to the private perusal and possession of a collection of sexually explicit material were violated by the totality of government conduct herein?

   a. Whether such activity consitutes outrageous conduct or governmental overreaching barring conviction under due process absent a showing of criminal activity by Petitioner outside that created by the Government?

   b. Whether the Petitioner was entrapped as a matter of law and fact by such conduct?

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OPINIONS BELOW

Petitioner, Nathan Vacanti, prays that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Ninth Circuit affirming Petitioners conviction below.

The memorandum opinion of the Ninth Circuit Court of Appeals affirming Petitioners conviction (Appendix B) was not reported.

The Judgment of the District Court for the Eastern District of Washington based upon a jury verdict of Guilty (Appendix A) was not reported.

JURISDICTION

The judgment of the Court of Appeals was filed February 18, 1988. There was no motion for rehearing filed. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES INVOLVED

Constitutional Provisions, Treaties and Statutes Involved herein are as follows:

UNITED STATES CONSTITUTION, AMENDMENT I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. 2252:

(a) Any person who —

(1) knowingly transports or ships in interstate or foreign commerce or mails any visual depiction, if —

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; or

(2) knowingly receives, or distributes any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if —

(A) the producing of such casual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct; shall be punished as provided in subsection (b) of this section.

(b) Any individual who violates this section shall be fined not more than $100,000, or imprisoned not more than 10 years, or both, but if such individual has a prior conviction under this section, such individual shall be fined not more than $200,000, or imprisoned not less than two years nor more than 15 years, or both. Any organization which violates this section shall be fined not more than $250,000.

STATEMENT OF THE CASE

The Petitioner was charged with two counts, specifically: Count I, on June 19, 1986, he did knowingly and wilfully enter into the United States mails an envelope addressed to Richard Dupont, the contents of which was a video cassette tape containing visual depictions of minors engaged in sexually explicit conduct; Count II, on June 19, 1986, he did knowingly and wilfully enter into the United States mails an envelope addressed to Stan Earl, the contents of which was a video cassette tape containing visual depiction of minors engaged in sexually explicit conduct; both in violation of Title 18 U.S.C., Sec. 2252(a)(1). Petitioner entered pleas of not guilty and counsel was appointed pursuant to the Criminal Justice Act.

Trial occurred on December 8, and December 9, 1986 with a guilty verdict reached on December 9, 1986. Petitioner was sentenced on January 16, 1987 to 5 years imprisonment, and on condition that he be incarcerated in a jail-type institution for thirty days, execution of the balance of the sentence, as to imprisonment only, was suspended and the Petitioner was placed on probation for a period of five years. (Appendix A) A notice of Appeal was filed on behalf of the Petitioner on January 23, 1987. By its order dated April 24, 1987, the Court terminated the Petitioner's access to appointed counsel on appeal.

The facts giving rise to the indictment of Petitioner are summarized as follows:

In the early part of 1985, Petitioner Nathan Vacanti received in the mail a publication entitled LoveLand, "The Newsletter for Lovers". The newsletter purported to be a medium through which individuals could establish contact with and communicate with each other regarding any interest they may have, particularly of a sexual nature. Petitioner received several copies of two issues of LoveLand. He was not aware of the origin of the publication and was not aware of why it was sent to him. He initially looked through LoveLand with some passing interest and curiosity, but did nothing else with it. In July, 1985, after several

copies had been received, in response to a notice offering a complimentary membership, the Petitioner enrolled as a member of LoveLand.

Petitioner's interest in LoveLand was the result of his interest in films and movies, a small portion of which included sexually explicit films and material. Petitioner was a collector of films, videos and movies, and had been actively collecting for several years and included a brief contact many years earlier with a mail-order center dealing with sexually oriented material in Denmark. Although his involvement with sexually explicit material had been dormant for quite some time the mailing of LoveLand resparked his interest in his collection, an interest that would not have been rekindled without LoveLand. His membership in LoveLand occurred on July 15, 1985.

Subsequent to "joining" LoveLand, Petitioner answered several ads in LoveLand. Two of these ads were Government test ads placed by Inspector Pilkey of the postal service.

Inspector Pilkey, upon receiving the inquiries of Petitioner regarding collecting wrote back to Petitioner assuming two names and replying with two letters. Pilkey's initial letter to Petitioner stated:

> Dear Mr. Vacanti (I presume)
>
> Thanks for responding to my No. 04992. If you are for real, I think this could be the start of some very pleasurable exchanges for both of us.
>
> As I stated in my ad, I am most interested in pursuit and conquest of pussy before tainted by hair, use, or old age. While your offer is most generous I fear you may be a Postal cop or such, and I have no desire to go to jail at my age. I hope you will indulge my concern and accept my offer.
>
> I have included a blank VHS tape onto which I hope you will copy a sample of the items I am interested in. If this meets with your approval and after I receive the tape back, I will then forward one of my tapes along with another blank. You can then copy my

tape for yourself, make a copy of one of yours for me and return both. If all goes well I think my present collection of 20 such films and tapes should keep us corresponding for quite some time. I would also be interested in having many of my mags on film also.

I will await your response and hopefully a stimulating tape.

Until then — Regards,
Stan Earl
P.O. Box 1371
Belgrade, MT 59714

In response hereto, Petitioner placed the video tapes in question in the United States mail.

The basis for Federal Jurisdiction in the first instance was the alleged violation of 18 U.S.C. 2252, the mailing of sexually explicit material involving minors.

ARGUMENT FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT SECURING THE FIRST AND FOURTEENTH AMENDMENT RIGHTS TO FREEDOM OF EXPRESSION AND TO READ AND OBSERVE.

Stanley v. Georgia, 394 U.S. 537, 89 S.Ct. 1243, 22 L. Ed. 2d 542 (1969) holds that under both the First and Fourth Amendments, the private possession of obscene material is protected and cannot be criminalized. The Stanley Court's unanimous opinion concluded that the First and Fourteenth amendments prohibit making mere private possession of obscene material a crime. Thus, any attempt to prohibit the private possession of obscene material does not pass constitutional muster. If possession is not a crime, then it is axiomatic that the items possessed are not properly made the subject of a search warrant.

Both the First and Fourth Amendments are implicated whenever the Government seeks to invade the shelter of Stanley. "Clearly, the Court did not intend that one forfeit the shelter of Stanley merely by sharing his private collec-

tion of obscenity with another for his private use." United States v. Dellapic, 433 F.2d 1252, 1255 (2nd Cir., 1970).

Governmental over-involvement in crime, to an outrageous degree, is a defense long recognized. United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637 (1973). Governmental over-involvement, such as that herein, the barrage of LoveLand mailings intended to lure petitioner out of his Stanley zone, should be subjected to strict and exacting scrutiny. Cloistered in his home, petitioner was the recipient, the victim, of an intricate, sophisticated scheme created by the Government designed to lure him out of his private shelter.

B. THE DECISION BELOW IN FAILING TO DISMISS THE INDICTMENT DUE TO THE ENTRAPMENT OF PETITIONER AS A MATTER OF LAW WAS A DEPATURE FROM THE ACCEPTED COURSE OF JUDICIAL DECISIONS AND CALLS FOR AN EXERCISE OF THIS COURTS JURISDICTION.

In the consideration of the issue of entrapment, factors to consider in determining whether the defendant is an otherwise innocent person in whom the Government implanted the criminal design include:

> Among these are the character or reputation of the defendant, including any prior criminal record; whether the suggestion of the criminal activity was initially made by the Government; whether the defendant was engaged in the criminal activity for profit; whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion; and the nature of the inducement or persuasion supplied by the Government. While none of the factors alone indicates either the presence or absence of predisposition, the most important factor . . . is whether the defendant evidenced reluctance to engage in criminal activity which was overcome by repeated Government inducement.
>
> U.S. v. Kiminski, 703 F.2d 1004, 1008, (7th Cir. 1983); U.S. v. Reynoso-Ulloa, 548 F.2d 1329 (9th Cir. 1977).

In the case at bar, the evidence established that the Petitioner essentially was unknown to the postal inspectors prior to the LoveLand operation, other than a minor reference to Petitioner's name as an orderee involved with a pornographic mail-order establishment in Denmark.

The initial suggestion of criminal activity associated with this charge was made by the Government through its publication and distribution of Loveland and the requests for pornographic material depicting minors. The Petitioner was not involved in this activity for profit. The Petitioner was initially reluctant to become involved in Loveland as indicated by his delay in responding. The Government's approach to inducing Petitioner into committing a crime was the result of a very sophisticated scheme designed to lure him into the activities proposed and directed by the Government. The sophisticated nature of this inducement is shown by the following:

(a) The background and development of the Loveland program.

(b) The questionnaire and application for membership.

(c) The nature and focus of the editorials and ads contained in the publication Loveland.

(d) The availability to Government agents of training and program guidelines in connection with drafting ads and responding to mailings.

(e) The repeated number of mailings of Loveland to the Petitioner.

(f) The nature and focus of response letters from Inspector Pilkey to Petitioner.

The Petitioner, upon initially receiving Loveland, briefly perused the issue and set it aside. As more mailings were received, his review of them became more lengthy. The interest of Petitioner in pornography, long dormant, was being reawakened by Loveland. Petitioner's interest in collecting led him to apply for membership in Loveland.

Shortly after "joining" Loveland, Petitioner responded to several ads, two of which specifically turned out to be Government test ads. Both ads specifically, up front,

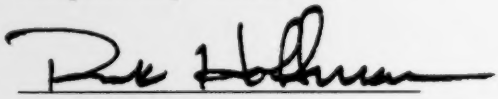
emphasized the "collector" aspect. Petitioner's responses to these ads were nearly identical and focused on collecting, trading, expanding an interest, but did not mention child pornography. The inspector's response to Petitioner's letter introduced the child pornography aspect and requested an immediate mailing.

The suggestion of the criminal activity herein was the invention of the Government.

CONCLUSION

For the above reasons, a writ or certiorari should issue to review the opinion of the Court of Appeals.

Respectfully submitted,



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United States of America vs.

United States District Court for Eastern District or Washington

DEFENDANT NATHAN VACANTI

DOCKET NO. → CR-86-267-1

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 9 83

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
01	16	86

COUNSEL

___ **WITHOUT COUNSEL** However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

X **WITH COUNSEL** Rick Hoffman
(Name of Counsel)

PLEA

___ **GUILTY**, and the court being satisfied that there is a factual basis for the plea. ___ **NOLO CONTENDERE**, X **NOT GUILTY**

FINDING & JUDGMENT

There being a verdict of ___ **NOT GUILTY**, Defendant is discharged
X **GUILTY**.

Defendant has been convicted as charged of the offense(s) of Count 1 - 18 U.S.C. 2252(a)(1) — Transportation of Material Involving Sexual Exploitation of a Minor. Count 2 — 18 U.S.C. 2252(a)(1) — Transportation of Material Involving Sexual Exploitation of a Minor.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE OR PROBATION ORDER

As to Count 1 — Five years and on condition that the Defendant be incarcerated in a jail-type institution for a period of thirty days, execution of the balance of sentence as to imprisonment only is hereby suspended and Defendant is placed on probation for a period of five years.

Count 2 — Five years and on condition that the Defendant be incarcerated in a jail-type institution for a period of thirty days, execution of the balance of sentence as to imprisonment only is hereby suspended and Defendant is placed on probabtion for a period of five years.

SPECIAL CONDITIONS OF PROBATION

(1) Defendant shall avoid all contact with child pornography in any form.

(2) Defendant shall perform 200 hours of community service as the Probation officer may direct.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends:

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE 1-20-87

By Bruce A. Anderson

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Alan A. McDonald

ALAN A. McDONALD

Date 1/17/87

( ) CLERK

(X) DEPUTY

Appendix A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA Plaintiff-Appellee, v. NATHAN VACANTI, Defendant-Appellant.	No. 87-3012 D.C. No. CR 86-267-1-AAM MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Alan A. McDonald, District Judge, Presiding
Argued and Submitted October 8, 1987
San Francisco, California

FILED _____

Before: BROWNING, Chief Judge, PREGERSON and REINHARDT, Circuit Judges

Appellant Vacanti appeals his conviction on two counts of mailing material involving sexual exploitation of minors in violation of 18 U.S.C. § 2252(a)(1). He challenges his conviction on the grounds that his due process rights were violated by outrageous government conduct; that he was entrapped as a matter of law; that evidence offered against him was inadmissible hearsay;

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

and that the statute he was prosecuted under was unconstitutionally vague and overbroad. We affirm.

The Postal Inspection Service published a newsletter called Love Land which included ads offering sexually oriented material. Some of the ads were written by postal agents to attract people who might use the mail to distribute child pornography. After receiving several copies of the newsletter, Vacanti responded to a notice offering a complimentary membership and enrolled as a "member" of Love Land. Subsequently, Vacanti answered four ads published in Love Land. Two were written by a postal inspector posing as two different individuals with an interest in child pornography and resulted in correspondence between Vacanti and the inspector.

Vacanti wrote that he would not sell copies from his video collection, but was interested in sharing his collection in return for the opportunity to copy material from the collections of others. The postal inspector responded by requesting a sample tape. In one case, he enclosed a blank tape for Vacanti's use. Vacanti mailed two packages containing video tapes to the inspector.[1] The packages included letters from Vacanti advising the recipient to use U.P.S. and not the U.S. mail for future transactions. The letters also noted that the return address on the envelopes, which was different than that on the letters, should be disregarded "for obvious reasons."

The government introduced evidence that Vacanti had had an interest in child pornography at an earlier date. The government introduced letters written by Vacanti to a Danish organization, the "Les Young

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[1] The parties stipulated at trial that the tapes contained pornography involving minors under the age of 18. Trial Transcript at 76.

Club," which offered pornographic material for sale, and a brochure produced by that organization. A postal inspector testified that order numbers in Vacanti's letters corresponded to catalog items in the brochure involving child pornography. Vacanti admitted at trial that he had ordered films involving child pornography from Denmark.

Vacanti's first argument is that the government engaged in outrageous conduct violating his right to due process by publishing the Love Land newsletter and soliciting illegal conduct by advertisement published in its column. The outrageous conduct defense is limited to the set of cases in which the government action "shocks our sense of justice." United States v. Stenberg, 803 F.2d 422, 429 (9th Cir. 1986) (quoting United States v. So, 755 F.2d 1350, 1353 (9th Cir. 1985); see also United States v. Russell, 411 U.S. 423, 431-32 (1973).

Although it came close to the line, the government's conduct did not cross the line in this case. While the government created Love Land, it cannot be said that the postal inspectors "engineer(ed) and direct(ed) the criminal enterprise from start to finish," since the newsletter itself did not involve "criminal activity" prohibited by 18 U.S.C.§ 2252. United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983). The inspector's conduct in drafting ads and writing letters requesting or offering child pornography falls within this court's holding that in the course of infiltrating "criminal ranks" government investigators "must be permitted, within reason, to assume identities that will be convincing to the criminal elements they have to deal with." United States v. McQuin, 612 F.2d 1193, 1195-96 (9th Cir. 1980) (per curiam). Although the inspector may have invited appellant to mail the objectionable material, he did not coerce appellant to do so.

Nor was Vacanti entrapped as a matter of law. His

involvement with the Danish distributor of child pornography, and specifically his orders of such material from that source, indicates a predisposition to receive child pornography through the mail. In addition, Vacanti used false return addresses for "obvious reasons" and requested that further contacts between him and other traders be conducted via U.P.S. Based on these facts a reasonable jury could find the government did no more than provide Vacanti with an opportunity to commit a crime he was already predisposed to commit.

Vacanti argues that the two letters he wrote to Les Young Club and the Club's brochure were hearsay and inadmissible to prove predispositon, citing United States v. McClain, 531 F.2d 431, 435 (9th Cir. 1976).

The letters contained incriminating statements by Vacanti. As admissions by a party, they were not hearsay under Federal Rule of Evidence 801(d)(2)(A) and were properly received in evidence. See United States v. Moran, 759 F.2d 777, 786 (9th Cir. 1985). The Danish brochure was properly admitted under Federal Rule of Evidence 803(24). It was trustworthy, offered as evidence of a material fact, more probative than any other available evidence on the issue for which it was introduced, and its admission served the purposes of the rules and the interests of justice. The absence of evidence that the brochure was anything other than what it appeared to be, the remote source of the document, and the likelihood that it was trustworthy justified its admission even though no custodian was available to testify at trial. Karme v. Commissioner, 673 F.2d 1062, 1064-65 (9th Cir. 1982). Testimony of agents of the "Les Young Club" would have been extremely difficult to obtain in Yakima, Washington. The fact that the numbers in appellant's letters to Les Young matched the numbers printed in the brochure confirms the reliability of both.

Finally, contrary to appellant's argument, the statute is neither unconstitutionally vague nor overbroad. See United States v. Wiegand, 812 F.2d 1239, 1243-45 (9th Cir. 1987); United States v. Andersson, 803 F.2d 903, 905-06 (7th Cir. 1986). See also New York v. Ferber, 458 U.S. 747 (1982).

AFFIRMED.